

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs December 20, 2005

STATE OF TENNESSEE v. PAMELA SUE KING

**Direct Appeal from the Criminal Court for Davidson County
No. 97-D-2405 Seth Norman, Judge**

No. M2005-00530-CCA-R3-PC - Filed March 16, 2006

The petitioner, Pamela Sue King, appeals from the denial of her petition for post-conviction relief. On appeal, she contends that she was denied the effective assistance of trial counsel. Following our review of the record and the parties' briefs, we affirm the judgment of the post-conviction court denying post-conviction relief.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which DAVID H. WELLES and JOHN EVERETT WILLIAMS, JJ., joined.

Mark A. Kovach, Nashville, Tennessee, for the appellant, Pamela Sue King.

Paul G. Summers, Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; Victor S. Johnson III, District Attorney General; and Dan Hamm, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS & PROCEDURAL HISTORY

The petitioner was convicted by jury of second degree murder and received a twenty-three year sentence as a violent offender. On direct appeal, this court affirmed the petitioner's conviction and sentence. *See State v. Pamela Sue King*, No. M2000-00148-CCA-CD, 2001 WL 1398135 (Tenn. Crim. App., at Nashville, Nov. 9, 2001). The following is a recitation of the convicting evidence set forth in this court's opinion on direct appeal:

Kevin Brandon, the victim in this case, was the ex-husband of the defendant's roommate, Ruby Linette Brandon. He was also the father of Ms. Brandon's three small children, a four-year-old son and two-year-old twin daughters. Although Ms.

Brandon denied the relationship, the defendant claimed that she and Ms. Brandon were on-again, off-again lesbian lovers, and that the victim blamed her for the breakup of his marriage. As a consequence, the defendant and the victim did not get along.

A few days before his August 13, 1997, death, the victim took his four-year-old son with him on a three-day weekend trip to Seattle to attend a funeral. When they returned to Nashville on Monday, August 11, Ms. Brandon, who had recently broken both of her ankles and was confined to a wheelchair, allowed the victim to stay at the house on Cadogan Court in Antioch, Tennessee, where she and the defendant had recently moved, in order to help care for their children. According to Ms. Brandon's testimony, she and the defendant agreed in a telephone conversation that it would be best for the victim, who was not working at the time because of a strike at his place of employment, to help care for the children during Ms. Brandon's recuperation, and for the defendant to move out. In order to avoid a confrontation, the defendant stayed away for the first two days following the victim's arrival. On the third day, Wednesday, August 13, the victim agreed to leave the house long enough for the defendant to retrieve her belongings. He left the house with their son, and Ms. Brandon paged the defendant to come get her belongings.

The defendant had been at the home for approximately ten or fifteen minutes, and was in the kitchen talking to Ms. Brandon, when the victim returned and told her that he had given her enough time to get her possessions. The two began arguing. The defendant then went to the attached garage to pack her belongings, while the victim stayed inside the house to talk with Ms. Brandon.

Approximately fifteen or twenty minutes later, after Ms. Brandon had opened the house door leading to the garage to hand the defendant her driver's license, the victim and the defendant began arguing again, with the victim once again telling the defendant to leave, and the defendant telling the victim that he was going to have to give her more time. Ms. Brandon testified that the victim then became "infuriated." She said that she told him to stay in the house, and that the defendant would be finished packing in a minute. She tried to keep the victim inside the house by first holding onto the belt loop of his pants, and then his T-shirt, but he took the shirt off, went out the front door, and around to the garage.

Through the doorway leading into the garage, Ms. Brandon watched the victim take several steps into the garage, toward the driver's door of the defendant's car. She said that the victim had nothing in his hands as he approached the defendant, and was not yelling or screaming. Ms. Brandon then saw the defendant make a "gesture from behind her back," whereupon Ms. Brandon yelled the warning, "Kevin, there could be a gun involved." She next heard a popping sound, and saw the victim turn his back to the defendant. As she was frantically trying to wheel into the living room to

telephone 911, the victim came in the front door, closely followed by the defendant. Ms. Brandon testified that the victim fell to the floor in the hallway, where the defendant shot him again, and then, placing the gun against his temple, shot him once more. While the defendant was shooting the victim, the children were hysterical, with the four-year-old clinging to her leg, and pleading with her, "Please don't hurt my daddy, please don't hurt my daddy." The defendant then went into the kitchen, got a knife, returned to the hallway, straddled the victim's body, and cut his neck.

A neighbor, Hayes Washington, heard a gunshot and witnessed the defendant chasing the victim into the house. He said that the victim did not have a weapon. He heard two more gunshots and "a whole bunch of screaming" after they had gone inside the house. Washington then entered the house, where he found the defendant hysterical and screaming. The victim was lying on the floor with his throat cut. A steak knife was on his neck, and a small caliber pistol was lying beside his head. Washington put the knife on a table, and removed the gun from the house, placing it on the ground beside a tree when police officers arrived at the scene.

Officers Roy Morris and Melissa Kelly, of the Metro Police Department, were the first officers to arrive at the scene. Upon Officer Morris's arrival, Washington directed his attention to the .25 caliber semi-automatic chrome pistol on the ground next to a tree, and pointed out the weeping, screaming defendant, who was lying half in and half out of the doorway of the house. Officer Morris noticed that the defendant "had blood on both hands from the upper portion of the forearm all the way down covering both hands." Officer Kelly, who arrived at the scene immediately after Officer Morris, testified that the defendant was "sobbing, and crying, and kicking her feet." After arresting the defendant and placing her in his patrol car, Officer Morris went inside the house, where he observed the victim, who appeared to be dead, lying on his back in the hallway with a "sizeable hole in his throat," and a bullet wound to the back of his head.

Detective Jeff West, of the Metro Police Department Homicide Unit, testified that he observed three gunshot wounds to the victim: one to the back of his head, one to the chest, and one to the right arm. He also observed laceration wounds to the neck area and what appeared to be stab wounds to the victim's face. Detective West said that the steak knife and the pistol were the only weapons discovered at the scene. Officer Earl Hunter, a crime scene investigator with the Identification Unit of the Metro Police Department, testified that there were no live rounds in either the chamber or the magazine of the gun when it was collected at the scene. Officer Charles Ray Blackwood, Jr., testified that a trail of blood led from the garage, around to the sidewalk, up the front steps, and to the front door of the house.

Dr. Emily Ward, the medical examiner who performed the autopsy of the victim's body, testified that the manner of death was homicide, and that the cause of death

was multiple gunshot wounds. Her examination revealed that the victim suffered three gunshot wounds and several incised wounds, or cuts. There was a gunshot wound to the head in which the bullet entered the right side of the head, passed through the right side of the brain, and lodged in the base of the skull; a gunshot wound to the chest in which the bullet passed through the left ventricle of the heart, continued through the left lung, passed through the left ninth rib on the back of the chest, and lodged in the skin; and a gunshot wound to the right arm in which the bullet entered the back of the right arm, exited the front of the right forearm, and then reentered the arm above the elbow. Dr. Ward testified that the head wound was a contact wound, meaning that the gun had been firmly pressed into the victim's head when it was fired. The wound to the heart and lungs, she said, would have caused a very rapid drop in blood pressure and, "within a relatively short period of time," compromised the victim's ability to breathe and move. The victim had four separate small cuts in a semicircle around his left eye, and a group of cuts with a dimension of about three to four inches on the front of his neck. Dr. Ward was unable to determine if the cuts on the victim's neck were caused by one continuous movement of the knife, or by multiple cuts. She found no defensive wounds on the victim's body.

The State's final witness was Sergeant Johnny L. Hunter of the Identification Division of the Metro Police Department. After being accepted by the court as an expert in the field of blood spatter analysis, he testified that the blood on the garage floor, on the steps leading out of the house into the garage, and in front of the house on the pavement, was low velocity blood spatter, consistent with free-flowing blood dropping from a wound. Inside the house, he found expectorant blood spatter (i.e., blood consistent with that expelled by a victim's coughing or sneezing) beside the victim's head, and cast-off blood spatter, in the form of bloody handprints, on the wall beside the victim's body.

The thirty-two-year-old defendant testified on her own behalf. She said that she brought several items to return to Ms. Brandon when she arrived at the home, including the gun that Ms. Brandon had earlier left under the defendant's car seat, and which the defendant had in her pocket as she entered the home. She first greeted Ms. Brandon and her daughters, and then went out to the garage to pack her belongings and load them into her car. Later, she heard Ms. Brandon crying and went to the kitchen to ask her what was wrong. As Ms. Brandon told her that she loved her and did not want her to leave, the victim entered the kitchen and began screaming obscenities at the defendant, calling her a "dyke" and a "white bitch," and telling her that he was going to kill her. The defendant said that she begged the victim to allow her to leave, and then ran out into the garage. The victim continued screaming that he was going to kill her, and then ran through the house and into the garage. He ran toward her, reaching behind his back as he did so, and laughing and

telling her again that he was going to kill her. At that point, she reached into her pocket and fired her gun at him.

The defendant said that she had no intention of killing the victim when she went to the home, and that she fired at him only because she feared for her life. After firing the first shot, the victim was still standing, and continued coming toward her. He then turned to go out of the garage, and so did she. The next thing she remembered was being in the house. She said that she was hysterical, afraid for her life, and did not know what to do. She remembered the victim standing in the house and screaming, and remembered herself screaming. She fired a shot, and the victim was still screaming. She said that she remembered "clicking the gun 'til there was-just kept clicking, and clicking." She also remembered having the knife in her hand, that the victim was still moving, and that she was afraid he would kill her. She could not remember having cut the victim with the knife, but did not deny that the cuts had been made by her.

The defendant described several earlier confrontations in which, she said, the victim had physically attacked and assaulted her. She testified that the victim had threatened her a number of times in the past, and made harassing and threatening phone calls. According to the defendant, she and Ms. Brandon periodically separated during the years that they lived together, because the victim would start calling or riding by their house, or making threats toward her. She said that Ms. Brandon told her that she feared what the victim would do to her. The defendant also claimed that the reason she and Ms. Brandon had chosen the house on Cadogan Court was because it had an attached garage, so that the victim would not be able to drive by and see her car parked at the house.

On cross-examination, the defendant admitted that she had not seen anything in the victim's hand when he ran toward her in the garage. She repeated, however, that he had laughed and reached behind his back as he ran toward her. She said that he told her he had something for her, and that she heard Ms. Brandon yell out something about a gun. She denied having heard Ms. Brandon direct her warning to the victim, rather than to herself, and claimed that she did not remember having told the police, in the statement she gave immediately after the shooting, that she had heard Ms. Brandon call out "Kevin, look out, there's a gun in the house, there's a gun in the house." She also did not remember having told the police that the victim was inside the house for a while, after being shot in the garage, while she was still outside the house.

The State then played the videotape of the defendant's statement to police before the jury. The tape reveals that the defendant admitted during the interview that she heard Ms. Brandon call out "Kevin, there's a gun in the house." The tape also reveals, however, that the defendant told the police that she thought that perhaps Ms. Brandon

was trying to warn her. During one point in the interview, the defendant told the police that the victim answered the warning by saying, "I'm not worried about that white bitch, I've got a gun of my own." Later during the interview, she said that the victim had said, presumably to her, "That's all right bitch, I've got a gun of my own." The defendant also said, when questioned about the sequence of events, that she thought that the victim was in the house for a while, after first being shot, before she went into the house. The videotape was admitted into evidence.

King, 2001 WL 1398135 at *1-4.

On August 21, 2002, the petitioner filed a pro se petition for post-conviction relief, alleging that she received the ineffective assistance of trial counsel. Post-conviction counsel was appointed, an amended petition was filed, and a hearing was held. At the evidentiary hearing, the petitioner testified that her trial counsel consulted with her for only thirty-five minutes prior to trial. The petitioner stated that during the meeting she told trial counsel about her "homosexual relationship" with the victim's wife and the animosity the victim had towards her as a result of this relationship. According to the petitioner, she provided to trial counsel names of witnesses who could corroborate her relationship with the victim's wife. The petitioner also told trial counsel that she had a history of "drug and alcohol abuse and other psychological problems." However, the petitioner asserted that trial counsel told her that the information about her relationship with the victim's wife and her psychological problems was not relevant to her case. The petitioner also claimed that trial counsel never informed her of any plea offers proposed by the state. The petitioner stated that she later discovered the state had made an initial plea offer of thirty-five years.

On cross-examination, the petitioner acknowledged that the facts of her relationship with the victim's wife and the resulting animosity between her and the victim could have been used by the state to show the petitioner's animosity towards the victim rather than vice versa. She also acknowledged that both witnesses at trial named her as the aggressor, though she insisted that another witness could have testified to previous occasions where the victim caused the petitioner to fear him. She claimed that on previous occasions the victim hit her. The petitioner further conceded that her sentence of twenty-three years was less than the state's initial plea offer of thirty-five years.

The petitioner's trial counsel testified that he had been practicing criminal law for approximately twenty-nine years. He testified that he met with the petitioner several times before trial. According to trial counsel, "their visits would be at least two hours." He stated that he discussed potential witnesses with the petitioner, but he did not recall if he received a witness list. He acknowledged that files from the petitioner's case were inadvertently destroyed when he retired. Trial counsel recalled that the petitioner mentioned her relationship with the victim's former wife. Trial counsel stated that he was certain that he investigated the petitioner's claim that the victim had been aggressive towards her in the past.

Trial counsel testified that he raised the issue of self-defense and the issue of voluntary manslaughter at trial. He recalled that the jury heard about the homosexual relationship between the

petitioner and the victim's wife through the testimony of the petitioner. Also, he recalled that the victim's wife denied the relationship during cross-examination, but the denial was not believable. Trial counsel said he suspected that the jury determined the existence of the relationship, and pointed out that the state in closing argument alluded to the possibility of this relationship. In addition, trial counsel related that the circumstances surrounding the victim's murder were brutal. Therefore, his theory of defense focused on the justification of the murder. Trial counsel stated he argued heat of passion, voluntary manslaughter, and to some extent, self-defense.

Trial counsel acknowledged that he had viewed the videotape of the petitioner's statement to police where the petitioner indicated that she did not remember what happened. However, trial counsel asserted that the tape did not weaken the defense, therefore, he did not file a motion to suppress. Trial counsel also noted that he believed the trial judge would have been reluctant to instruct the jury on self-defense without the videotape. In addition, trial counsel acknowledged that he was aware that the petitioner had a history of drug abuse, but he could not recall being informed of any history of psychiatric problems. He stated that if the petitioner had a "meaningful history of psychiatric problems," then a mental evaluation would have been pursued. However, petitioner stated that at the time requesting a mental evaluation did not fit into the defense strategy.

Trial counsel testified that "there was substantial cross-examination" of Ms. Brandon, the victim's wife, and Mr. Washington, the two eyewitness in the case. He asserted that the victim's wife's credibility was somewhat impeached after she was not forthcoming about her relationship with the petitioner. He further asserted that he did not cross-examine a witness if there was no contradictory testimony to rebut. Trial counsel also stated that he did not call character witnesses because these witnesses would have impeded his strategy to create reasonable doubt regarding premeditation. Trial counsel indicated that the state was focusing on the brutality of the murder and not really attacking the petitioner's character. Trial counsel also suggested that over-emphasizing the animosity between the petitioner and the victim would have aided the state in proving premeditation. Regarding the state's plea offer, trial counsel admitted that he did not recollect the offer, but claimed that he would have discussed the state's offer with the petitioner. Trial counsel noted that the state's offer of thirty-five years at 100% was less favorable than the twenty-three year sentence the petitioner received.

After a thorough review of the petitioner's claims, the post-conviction court set out in great detail an order denying post-conviction relief. The court credited trial counsel's testimony and found no deficient performance or prejudice entitling the petitioner to relief. The petitioner appealed.

On appeal, the petitioner argues she received the ineffective assistance of counsel because her trial counsel failed to properly investigate and prepare her case for trial. Specifically, the petitioner argues that trial counsel was ineffective because he (1) failed to object to when the trial judge allowed the jury to take a dictionary to the deliberation room; (2) failed to file a motion to suppress; (3) failed to meet with the petitioner for a substantial length of time before trial; and (4) failed to thoroughly cross-examine the state's witnesses.

In order for a petitioner to succeed on a post-conviction claim, the petitioner must prove the allegations set forth in his petition by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). On appeal, this court is required to affirm the post-conviction court's findings unless the petitioner proves that the evidence preponderates against those findings. *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). Our review of the post-conviction court's factual findings is de novo with a presumption that the findings are correct. *Fields v. State*, 40 S.W.3d 450, 457-58 (Tenn. 2001). Our review of the post-conviction court's legal conclusions and application of law to facts is de novo without a presumption of correctness. *Id.*

To establish ineffective assistance of counsel, the petitioner must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense rendering the outcome unreliable or fundamentally unfair. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); see also *Arnold v. State*, 143 S.W.3d 784, 787 (Tenn. 2004). Deficient performance is shown if counsel's conduct fell below an objective standard of reasonableness under prevailing professional standards. *Strickland*, 466 U.S. at 688; see also *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975) (establishing that representation should be within the range of competence demanded of attorneys in criminal cases). Prejudice is shown if, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694. If either element of ineffective assistance of counsel has not been established, a court need not address the other element. *Id.* at 697; see also *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). Also, a fair assessment of counsel's performance, "requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689; see also *Nichols v. State*, 90 S.W.3d 576, 587 (Tenn. 2002). The fact that a particular strategy or tactical decision failed does not by itself establish ineffective assistance of counsel. *Goad*, 938 S.W.2d at 369. However, deference is given to strategy and tactical decisions only if the decisions are informed ones based upon adequate preparation. *Id.* (citations omitted).

Upon review, we conclude that the petitioner failed to prove her claim of ineffective assistance of counsel by clear and convincing evidence. With respect to the petitioner's claims on appeal, the post-conviction court stated the following:

1. The petitioner's first issue deals with counsel's failure to object to the trial court's giving the jury a dictionary to help them determine the definition of a word in the charge. Petitioner complains that such extraneous information could have been a viable ground for relief on appeal, however counsel neglected to preserve the issue by failing to raise it in the motion for new trial.

This issue was discussed by the Court of Criminal Appeals in its order affirming petitioner's conviction. It opined that the issue was waived due to counsel's failure to raise it in the motion for new trial, however, it concluded that there was no proof that the jury actually considered any extraneous prejudicial information. It was also unproven that the trial court ever actually supplied the jury

with the dictionary, but may have simply mentioned that one was available if [the jury] needed to refer to it. This issue is without merit.

2. Petitioner next argues that counsel should have filed a motion to suppress a taped statement made by petitioner to police detectives. At the evidentiary hearing, [trial counsel] testified that he did not file such a motion because either there was no basis for it or that it had no damaging effect. Neither in her Petition, nor at the hearing, did the petitioner ever set forth any proof that such statement did, in fact, have any effect on the trial of this matter. The substance or the degree of any alleged damning effect of such statement was never presented before the Court, so it is impossible to determine whether any efforts to suppress it would have been absolutely necessary for counsel to avoid ineffective representation of the petitioner. The petitioner has failed to demonstrate that counsel's representation fell below the standard demanded of him in his capacity of her attorney with regard to the suppression of her statement.

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[3.] The petitioner's next argument is that counsel was ineffective for failing to confer with her prior to trial. She claims that [trial counsel] met with her only once, for a total of approximately 35 minutes before trial. However, [trial counsel] avers that he met with the petitioner on several occasions for an average of about 2 hours per visit. Due to the conflict in testimony, the issue rests on the credibility of the petitioner versus that of [trial counsel].

The credibility and weight of the witnesses' testimony is to be resolved by the post-conviction court. *Black v. State*, 794 S.W.2d 752, 755 (Tenn.Crim.App.1990). If, in fact, [trial counsel] had only met with the petitioner for a total of 35 minutes prior to trial, he was certainly well-prepared to defend the petitioner in the matter. Although the petitioner was ultimately convicted of second degree murder, counsel somehow managed to prevent the jury from finding the petitioner guilty of the indicted offense of first degree murder. 35 minutes is a ridiculously minimal amount of time for an attorney to confer with his or her client, especially if the charge is first degree murder. It does not seem possible that such an accusation could be true in light of [trial counsel's] preparation and knowledge of the case which resulted in a more desirable conclusion than that which the petitioner could have faced.

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[4.] Petitioner next argues that counsel was ineffective for not adequately cross-examining witnesses testifying on behalf of the state. Petitioner targets the testimony of Hayes Washington, a witness present at the scene of the crime, and

Lynette Brandon, lover of the petitioner and ex-wife of the victim. The petitioner also complains of counsel's cross-examination of the medical examiner.

Points that petitioner claims should have been raised regarding Mr. Washington include questions associated with his ability to clearly see the events, why there was no objection to his opinion that the victim was "running for his life," why he tampered with evidence by moving the weapons and whether he thought the victim was dead when he initially approached. Petitioner also contends that counsel should have pointed out inconsistencies in Mr. Washington's testimony regarding the number of shots fired and where he was when the shots were heard. The petitioner, however, has failed to explain just how the failure to make these inquiries and point out the inconsistencies resulted in deficient performance on behalf of [trial counsel]. The issue for the jury to decide at trial was not whether the petitioner killed the victim, but whether she was guilty of murder. It is uncertain as to how the raising of these points and inconsistencies on cross-examination could have resulted in a different outcome.

The petitioner claims that the cross-examination of Ms. Brandon was not thorough due to the failure to elicit testimony establishing the fact that Ms. Brandon instigated many fights between the petitioner and the victim, that Ms. Brandon and the petitioner were lesbian lovers, that Ms. Brandon had tried to hold back the victim as he attacked the petitioner and why Ms. Brandon had taken [the] watch of the victim, who accused the petitioner of such act.

The cross-examination of the medical examiner that the petitioner claims was inadequate revolves around a particular statement in which the examiner stated that a man of the victim's size could sustain the initial gunshot wounds and still run a block or two. The petitioner maintains that if this statement were true, then the victim could have continued to be a threat to the petitioner, thus deserving a lesser homicide offense than second degree murder.

It does not appear as though any significant effect could have resulted from the discovery of this information. The weight of the evidence against the petitioner in this case was overwhelming. The proof showed that the victim had several gunshot wounds, one of which struck him in the temple at close range while he was on the ground. Slashes on the victim's body had also been allegedly made by the petitioner after he had been subdued. The petitioner could have been found guilty of premeditation by virtue of the fatal bullet wound inflicted while the victim was incapacitated, but the jury found her guilty of second degree murder instead. This result could logically be the product of the jury's determination that the victim did, in fact, provoke the petitioner and/or that fear may have played a role in the murder. It does not appear as though the petitioner has proven by clear and convincing

evidence that counsel was ineffective regarding this aspect of his representation of the petitioner.

To reiterate, this court is required to affirm the post-conviction court's findings unless the petitioner proves that the evidence preponderates against those findings. From our review, the record clearly supports the post-conviction court's findings, and accordingly, we affirm the judgment of the post-conviction court denying post-conviction relief.

J.C. McLIN, JUDGE